

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:

**DANIEL RAY MOONEY and
CYNTHIA ANN MOONEY,**

Debtors.

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CASE NO. 400-43437-BJH-13

MEMORANDUM OPINION

Before the Court is the objection to confirmation filed by Clayton and Clinton Gill (the “Gill brothers”) in the Chapter 13 case of Daniel and Cynthia Mooney (the “Mooneys” or the “Debtors”). The confirmation hearing was held on October 7, 2002. At the conclusion of the hearing, the parties requested the opportunity to pursue settlement negotiations and, if unsuccessful in settling their disputes, to file post-trial briefs. Pursuant to an agreed briefing schedule, the last of those briefs was due on October 9, 2002, at which time the Court took the objection to confirmation under advisement.

The Court has jurisdiction over the Debtors’ chapter 13 case in accordance with 28 U.S.C. §§ 1334 and 157. Resolving an objection to confirmation is a core proceeding in accordance with 28 U.S.C. § 157. This Memorandum Opinion constitutes the Court’s findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

I. FACTUAL BACKGROUND

A. An Overview

Michael Gill died of cancer in 1994. After his death, Venita Gill, Michael's wife, supported their family through her work as an elementary school principal. In July of 1995, Mrs. Gill was killed in a car accident. The Gills left behind two sons, Clayton (then 18) and Clinton (then 15). Mrs. Gill's will named her sister, Cynthia Mooney (the debtor wife), as executrix of her estate and as trustee of two trusts to be established for her sons. Rather than establish those trusts, Cynthia Mooney and her husband, Daniel Mooney, diverted the proceeds from the liquidation of Mrs. Gill's estate to their own use. While the Mooneys have never properly accounted for the money, it is clear that all of it, approaching \$500,000.00, is now gone and the Gill brothers received very little of it. The Gill brothers ultimately hired a lawyer and filed a lawsuit against the Mooneys in the probate court in which they asserted claims for, among other things, breach of fiduciary duty, fraud, conversion, and tortious interference with their inheritance rights. In addition, the Gill brothers sought the imposition of a constructive trust and an accounting.

On July 11, 2000, shortly after the Probate Court issued a temporary injunction against the Mooneys and set the lawsuit for a fall trial, the Mooneys filed for relief under Chapter 13 of the Bankruptcy Code. The issue before the Court is whether the Debtors' plan, which proposes to pay unsecured creditors \$100.00 per month for five years, resulting in a payment to the Gill brothers of less than one percent (1%) of their unsecured claim (in present value dollars), has been proposed in good faith.¹

¹ The Debtors also filed an objection to the Gill brothers' claim, Claim No. 13 in the amount of "\$492,867.34 plus damages," on the ground that it is "grossly overstated." *See* First Amended Debtor's [sic] Obj. to Claims, p. 3. The Debtors also argued at the confirmation hearing that the Gill brothers have not given the Debtors proper credit for payments that have been made on this claim. However, the parties agreed at the hearing on confirmation that the objection to the Gill brothers' claim will be considered, if necessary, after the Court rules on the Gill brothers' objection to confirmation.

B. The Gory Details

As noted previously, Mrs. Gill died in 1995. Her will, admitted to probate in the Probate Court of Tarrant County, Texas (the “Probate Court”), appointed Cynthia Mooney as executrix of her estate in the event that her husband pre-deceased her. Gill Ex. 5. Mrs. Gill’s will also provided that if her husband failed to survive her, then her entire estate was devised to Cynthia Mooney, “in Trust, to be held, administered and distributed . . . for the benefit of my children, Clayton B. Gill and Clinton R. Gill.” Gill Ex. 5, § 5. The will also directed that Mrs. Gill’s estate be divided equally between her children, “with each child’s share being placed in a separate Trust for that child. When each child reaches twenty (20) years of age, his Trust shall be terminated and the Trust Assets, if any, shall be distributed to that child.” Gill Ex. 5, § 6. Mrs. Mooney was also appointed Clinton’s personal guardian in 1995 because he was a minor when his mother died.

It is undisputed that Mrs. Mooney never set up trusts for her nephews; she asserts that her probate lawyer advised against it. Moreover, Mrs. Mooney failed to: (i) file an accurate accounting of the assets in Mrs. Gill’s estate (the “Probate Estate”), (ii) segregate the funds realized from the liquidation of the Probate Estate from those of the Mooneys, (iii) keep Clayton’s portion of the Probate Estate separate from Clinton’s portion, (iv) maintain proper records of the Probate Estate assets, and (v) maintain proper records of, or keep receipts for, disbursements from the Probate Estate that she claims to have made on behalf of the Gill brothers. In addition to these failures to act, while serving in a fiduciary capacity to her nephews, Mrs. Mooney took their inheritance, put it in the Mooneys’ checking account, and then spent substantially all of it on herself and her immediate family. Stated most simply, she stole a substantial portion of the Gill brothers’

inheritance from them over the next few years.

Upon their mother's death in July of 1995, the Gill brothers moved in with their aunt and uncle (the Mooneys) and their two cousins (the Mooneys' children). At that time, the Mooneys were living in a 1,400 square foot home on Linwood Lane in Fort Worth (the "Linwood house"). Mrs. Mooney claims she was depressed after her sister died and that she sought medical care and took medications for depression and anxiety. She claims to have never recovered and that she continues to suffer from depression.

Notwithstanding her depression, Mrs. Mooney agreed to serve as executrix of her sister's estate and in November of 1995, she filed an Inventory, Appraisal and List of Claims in the Probate Court (the "Inventory") in which she was supposed to identify all of the assets of the Probate Estate. In the Inventory, Mrs. Mooney swore that the Probate Estate assets were worth approximately \$393,100.00. Gill Ex. 2. However, the Inventory as filed was not complete. In addition to the assets identified in the Inventory, Mrs. Gill owned a house at the time of her death. Mrs. Mooney was unable to explain why that house does not appear on the Inventory.² While she remembers selling the house and receiving those proceeds, Mrs. Mooney could not recall the amount of sale proceeds received. Mr. Mooney testified that he knew his wife had sold her sister's house and that the proceeds were part of the Gill brothers' inheritance. But, according to Mr. Mooney, the proceeds from the sale of this house were placed in the Mooneys' checking account and then spent.

² Mrs. Mooney insisted that the house *was* listed, under the category "mortgages, notes and cash," and that the \$59,000.00 listed as "cash" was an estimate of what would be received for the house once it was sold. However, the Court notes that Schedule A of the Inventory, entitled "Real Property" lists "\$ -0-". In addition to Mrs. Mooney's sworn statement, the Inventory was also signed and submitted to the Probate Court by Mark S. Stewart, Esq. The Court believes that Mr. Stewart, an attorney, would have listed a house under "real property," and not under "cash." For reasons explained below, the Court finds Mrs. Mooney's testimony at the confirmation hearing to be "not credible" and finds that Mrs. Gill's house was, in fact, omitted from the Inventory.

The Gill brothers did not receive any of the proceeds from the sale of their Mother's house.

In June of 1996, Mrs. Mooney settled a lawsuit arising from the car accident in which her sister was killed. According to Gill Exhibit 14, each of the Gill brothers should have received \$11,750.00 from this settlement. Not only are those sums not listed on the Inventory or any amended inventory filed with the Probate Court, those monies were apparently deposited into the Mooneys' checking account and, once again, spent.

In July of 1996, the Mooneys bought some real property on West Cleburne Road in Crowley, Texas (the "Crowley Property") because the Linwood house was too small for their now expanded family. Gill Ex. 3. The Mooneys used the Gill brothers' inheritance to buy the Crowley Property. Gill Ex. 4.³ Notwithstanding the fact that the Gill brothers' money was used to buy the Crowley Property, title to that property was taken in the Mooneys' name. There is no reference in the purchase documentation to the Gill brothers' interest in the property. Although Clinton was still a minor, the Mooneys did not inform the Probate Court of that disbursement.

For a time, the Mooneys had two mortgage payments: one on the Linwood house (until it was sold) and one on the Crowley Property. The Mooneys used the Gill brothers' money to make the mortgage payments on the Linwood house.⁴ *See, e.g.*, Gill Ex. 4, entry dated 1/16/97. In July of 1997, the Mooneys ultimately sold the Linwood house for less than the amount outstanding on their mortgage. Mrs. Mooney used \$6,125.41 of the Gill brothers' money to pay off the mortgage on the Linwood house at the closing. Gill Ex. 4, entry dated 7/31/97.

³Two entries appear on Gill Ex. 4, each dated December 1, 1996: one says "New house Clinton's part," one says "New house Clayton's part," and they are for \$27,950.00 each.

⁴ On this record, it is unclear whose funds were used to pay the mortgage on the Crowley Property.

The Gill brothers lived with the Mooneys until they went to college,⁵ and returned to the Mooney's home for summers and holidays. The relationship between the Gill brothers and the Mooneys began to deteriorate when Clayton approached his 20th birthday (recall that his "trust" was to terminate on his 20th birthday) and he asked for an accounting of the monies in both his trust and his brother's trust. Rather than admit that she had never established a trust for either of them, Mrs. Mooney told Clayton that their inheritance "was almost gone." In disbelief, Clayton again asked for an accounting. No accounting was provided to him at this time.

When Clayton turned twenty and his "trust" "terminated,"⁶ he received nothing from the Mooneys, as he was told there was nothing left in his trust. Clayton was told that his share of the money had been spent on his living expenses. Clayton did not believe that was possible. He had just graduated from high school when his mother died. That fall he went to Texas Tech to college. His first year's tuition was paid by grant, not by the Mooneys. Moreover, over every summer, he worked at a recreational facility to save money for school. During the school year, he worked part-time as an athletic trainer and, in exchange, received scholarships which helped to defray his college costs.⁷ Nevertheless, the Mooneys insisted that Clayton's share of his mother's estate was gone. Although it appears Clayton continued to request an accounting, none was provided.

In February of 1999, two years after Clayton's "trust" "terminated," Mrs. Mooney sent a

⁵Clayton had just graduated from high school when his Mother died. He started college at Texas Tech University a few months later. Clinton was only 15 when his Mother died.

⁶Of course, there was no trust. On this record, the Court cannot determine precisely when the Gill brothers learned that no trusts had ever been established. However, as late as the fall of 1998, when Mrs. Mooney asked Clinton to sign a check over to her, she told him that she would put it in his "trust."

⁷ It does appear that the Mooneys expended some of the funds to help with Clayton's educational expenses. *See, e.g.* Gill Ex. 4, entries dated 9/10/95 ("T.T. Housing - Clayton - \$575") and 1/9/96 (Texas Tech - Clayton - \$491.25").

letter to the “AIM Family of Funds” with instructions to liquidate Mrs. Gill’s account and forward the funds to Paine Webber where there were accounts allegedly for the benefit of Clayton and Clinton. Gill Ex. 11. This letter purports to be signed by Mrs. Mooney “C/F Clinton R. Gill” and by Clayton.⁸ However, Clayton testified that he did not sign the letter and did not know of the funds in that account at the time the letter was sent.⁹ He further testified that he has since learned that there was approximately \$60,000.00 in his mother’s mutual fund account, but that he never received one cent of it.

Like his brother, when Clinton was nearing his 20th birthday and his “trust” was about to terminate, he too asked his aunt for an accounting. No surprise, Mrs. Mooney did not have an accounting or an expense reconciliation for him either. They exchanged angry words. Clayton then called his aunt on his brother’s behalf and they too exchanged angry words. Mrs. Mooney admits that she told him that if he wanted an accounting, he could “eat [excrement].” After their arguments, Mrs. Mooney told Clinton he was no longer welcome at the Crowley Property, so he spent the rest of his Thanksgiving holiday with a friend and had not been back to the Crowley Property until very recently. *See infra* at n. 17.

The Gill brothers continued to request an accounting from their aunt. Because she had not kept proper records, in early 2000 Mrs. Mooney attempted to “reconstruct” the expenses incurred by the Mooneys in caring for the Gill brothers to show them how their inheritance had been spent. Mrs. Mooney’s “reconstruction” of expenses was admitted into evidence as Gill Exhibit 4 (the “Expense Reconstruction”). Mrs. Mooney testified that she prepared the Expense Reconstruction

⁸ It is unclear why Mrs. Mooney would have signed the letter for Clinton in February of 1999, as he had reached majority in May of 1998. Presumably, her guardianship had terminated.

⁹ The Court infers that Mrs. Mooney forged his name to the letter.

as a “rough draft.”

The Expense Reconstruction shows several charges to the Gill brothers for “room and board.” Mrs. Mooney testified that she did not actually charge them room and board; in other words, she did not deduct monies from the account each month to cover their room and board. Rather, when she was trying to reconstruct the record of where their money had gone, she retroactively invented such charges, claiming that the probate lawyer said it was okay to do so. Any number of the expenses shown on the Expense Reconstruction are highly questionable.¹⁰ In any event, the expenses listed total \$231,248.34. To that sum, Mrs. Mooney added \$25,000.00 in legal fees to the probate lawyer, Mr. Stewart, and \$26,884.00 in legal fees to Mr. Christie, the lawyer appointed by the Probate Court as Clinton’s attorney *ad litem*, bringing the aggregate total on the Expense Reconstruction to \$283,132.34.

On cross-examination, Mrs. Mooney admitted that many of the expenses set forth on the Expense Reconciliation were wrong. For example, she admitted that the stated fee of \$25,000.00 to Mr. Stewart was “complete and utter fiction,” she pulled the number “out of thin air.” In fact, Stewart had reduced his fee to \$1,500.00. Similarly, Mrs. Mooney admitted that Mr. Christie’s fee was \$2,400.00, not the \$26,884.00 she put on the Expense Reconstruction. Her figure was pure fabrication.

It is clear to the Court why Mrs. Mooney made up many of the expenses shown on the Expense Reconstruction. If the expenses shown on the Expense Reconstruction totaled the

¹⁰ For example, Mrs. Mooney appears to have written checks every month for long distance phone charges, ostensibly for the boys. *See, e.g.*, Gill Ex. 4, entry dated 11/10/95. She also routinely charged them for a roll of stamps to pay bills. *See, e.g.* Gill Ex. 4, entry dated 10/11/05. She seems to have purchased gifts with their funds, *see, e.g.* Gill Ex. 4, entry dated 12/20/05 (“Home Depot - Papaw’s drill - \$64.87”) and charged them excessive amounts for certain items. *See, e.g.* Gill Ex. 4, entry dated 11/27/97 (“Eckers - Clinton contact sol, deoderant [sic] - \$72.18”).

approximate value of the Probate Estate as shown on the Inventory, maybe the Gill brothers would drop their demands for a proper accounting.

Like his brother, when Clinton turned twenty, he received nothing from the “trust” his aunt was supposed to have established for him. In addition to his share of all of the monies discussed above, Clinton should have received social security benefits of approximately \$384.00 per month from his mother’s death until he reached majority. Needless to say, he has never seen any of that money either. He did, upon reaching majority in 1998, receive a check for approximately \$53,000.00 which had been paid into the registry of the Probate Court while he was a minor. Upon his receipt of that check, his aunt told him to endorse it over to her and she would add it to his “trust.” He did so, but there was no “trust” and his aunt spent the money.

Clinton also financed most of his education at Texas Tech by working as a Customer Service Manager for Tom Thumb over summers and holidays. Although it appears that the Mooneys initially helped Clinton with his college expenses, he testified that at some point, they sent him a bill and told him he would have to finance the rest of his education himself, which he did.

Unsuccessful in their attempts to get their aunt to fully explain where their inheritance had gone, the Gill brothers finally hired a lawyer and, on May 15, 2000, they filed a lawsuit against the Mooneys in the Probate Court in which they asserted claims for breach of fiduciary duty, fraud, conversion, and tortious interference with their inheritance rights.¹¹ They also asked the Probate

¹¹ On September 15, 2000, the Gill brothers filed a motion for relief from the stay in order to proceed with their action in the Probate Court. The Debtors opposed the motion, but this Court (Tillman, J.) modified the stay so that the lawsuit could proceed to trial in the Probate Court. The Debtors moved for reconsideration, which was denied by Order entered on March 7, 2001. On March 15, 2001, the Debtors appealed that ruling. On March 26, 2002, the United States District Court entered an Order affirming the modification of the stay. As noted later in this Memorandum Opinion, Mrs. Mooney expressed affection for her nephews and disbelief that they would be upset with her at the confirmation hearing. This is but one example of how the Mooneys continued to do everything in their power to prevent the merits of the Gill brothers’ claims from being heard. It is clear that the Mooneys have fought the Gill brothers at every step during these proceedings.

Court to impose a constructive trust on certain of the Mooneys' assets and to order Mrs. Mooney to provide a detailed accounting of the Probate Estate. Finally, they sought a temporary injunction to prevent the disposition of any Mooney assets which may have been purchased with their funds pending the trial. Gill Ex. 7.

This lawsuit alleged that in addition to the \$393,100.00 of assets listed on the Inventory, Mrs. Gill had significant non-probate assets which, when added to the value on the Inventory, would bring the total value of Mrs. Gill's estate to approximately \$500,000.00. Mrs. Mooney testified at the confirmation hearing that she had no reason to believe that the figures set forth in the Probate Court lawsuit were incorrect. In fact, she conceded that her sister's estate was probably worth about \$500,000.00. On June 1, 2000, the Probate Court heard the Gill brothers' request for a temporary injunction. The Probate Court found that the Gill brothers had established a "probable right to the recovery of damages from one or both of [the Mooneys] due to Defendant Cynthia Mooney's breaches of fiduciary duty," and that there was an "immediate danger that a breach of the peace or other improper conduct may occur" due to "threats and intimidation by or on behalf of the [Mooneys] or members of their family directed to Plaintiff Clinton R. Gill . . ." Gill Ex. 5. The Probate Court entered an Order enjoining the Mooneys from spending any funds or conveying any property "unless they first established that the assets do not constitute, or are not derived in any manner from the proceeds of, funds held or to be held in a fiduciary capacity for the benefit of Plaintiffs by Defendant Cynthia A. Mooney." *Id.* The Probate Court further ordered the Mooneys to maintain insurance on the Crowley Property designating the Gill brothers as loss payees, and it enjoined the Mooneys from contacting, communicating with, or threatening the Gill brothers. Lastly, the Probate Court scheduled a trial on the merits for October 17, 2000.

In July 2000, shortly after the Probate Court entered the order granting the temporary injunction, the Mooneys filed this Chapter 13 bankruptcy case.

II. THE BANKRUPTCY CASE

This is the Debtors' first bankruptcy case. At the time of their bankruptcy filing, both were employed. Mrs. Mooney worked for Western General Contractors, where she had been employed for the prior fifteen months and earned \$1,200.00 per month.¹² Gill Ex. 9. At the time of their bankruptcy filing, they were current on the mortgage on the Crowley Property. Their summary of schedules showed assets of \$242,565.72 and liabilities of \$113,052.08. The only secured creditors listed on the schedules were: (i) Chase Manhattan Mortgage, the mortgagee on the Crowley Property, with a debt of \$53,289.26 secured by that property (with a value of \$225,000.00) and (ii) Ford Credit, who financed their purchase of a 1999 Ford diesel truck, with a debt of \$11,833.24 secured by that truck (with a value of \$25,000.00).

The Debtors' original schedules were inaccurate in several respects. The original Schedule J failed to include any of their expenses. Gill Ex. 9. Although the Mooneys were living together at the time they filed this case, they had been separated, and Schedule J included as the only expense "Separate Living Expenses" of \$500.00 per month. In fact, the Mooneys had expenses for their mortgage, utilities, food, insurance, etc., which were simply omitted from Schedule J. While wrong, as originally filed Schedule J showed an excess of income over expenses of \$2,140.76. Notwithstanding the excess shown on Schedule J, the Debtors' preliminary plan proposed to pay creditors only \$100.00 per month.

Schedule F listed the Gill brothers as holding unsecured, disputed claims in an unknown

¹²She testified that she has since been unable to hold down a job, and explained that her ability to be employed for these fifteen months was because she was employed by a friend who "overlooked her bad days."

amount. Notwithstanding this “disputed” designation on their schedules, Mrs. Mooney testified at the confirmation hearing that she has never disputed that she owes the Gill brothers money “out of the house;” her only explanation as to why they were listed as holding disputed claims was that she did not understand the bankruptcy forms.

Mrs. Mooney testified repeatedly at the confirmation hearing that she always believed that the Crowley Property “was the boys’ property.” Yet the Crowley Property was titled solely in the Mooneys’ names and Schedule C claimed it as the Mooneys’ exempt homestead. Mrs. Mooney said she listed the Crowley Property as exempt because she thought it “lowers the taxes.” She claimed not to have understood that by claiming the Crowley Property as exempt, she was asserting an ownership interest in the property. She further testified that the schedules were prepared at a time when she shouldn’t have been making decisions. She characterized it as just “another mistake.”¹³ Notwithstanding all of these “mistakes,” the Debtors signed their schedules under penalty of perjury, swearing them to be accurate and complete. To date, the Debtors have not amended their schedule of claimed exemptions. While the Debtors amended their Schedule I on May 23, 2001 and September 3, 2002, despite these two amendments, Schedule I still misstates Mr. Mooney’s current employer.

¹³ On February 15, 2001, the Gill brothers filed an objection to the Mooneys’ claim of the Crowley Property as exempt. Despite Mrs. Mooney’s current claim that she always believed the house “belonged to the boys,” the Mooneys did not concede the point in response to the Gill brothers’ objection. In fact, it appears from a review of the Court files that the Gill brothers’ objection remains pending and unresolved. As further evidence of the extent to which the Mooneys went to avoid their obligations to their nephews, on June 7, 2001, the Debtors filed a Notice of Intention to Sell the Crowley Property free and clear of liens. Again, the Gill brothers objected to the sale, asserting several grounds for their objection. The Debtors then requested an expedited hearing, in which they stated that the Gill brothers “falsely assert a lien against the property. The Objecting Party certainly has claims against the Debtors but has no lien.” *See* Mot. for Expedited Hrg, p. 1. Of course, by June 2001, the Debtors were on notice of the Gill brothers’ claim that the Crowley Property was subject to a constructive trust in their favor. The Debtors ultimately withdrew their motion to sell and, as noted below, have now transferred title to the Crowley Property to the Gill brothers. *See infra* at fn. 17. They only did so, however, when they were about to be foreclosed by the mortgage company and after the Gill brothers agreed to provide the Mooneys with a “credit” for their “equity” in the house.

Mrs. Mooney testified at the confirmation hearing that she was very close to her sister and that she loved her nephews. She became quite emotional during this testimony, breaking down in tears because of the rift that arose between her nephews and her. She expressed disbelief that her nephews would sue her husband and her since she had “tried to do her best” for them. Like much of Mrs. Mooney’s testimony at the confirmation hearing, this testimony is simply not credible. In fact, it is incredible. That she could claim not to understand why her nephews are unhappy about her conduct is nothing short of ridiculous.

Both Debtors deny that the timing of their bankruptcy filing had anything to do with the Gill brothers’ lawsuit in the Probate Court. Mr. Mooney testified that the Debtors just happened to pick July of 2000 for their bankruptcy filing – it was a pure coincidence. Moreover, he testified that he was laid off five years ago, and that he had incurred a lot of credit card debt (approximately \$50,000.00) since that time.¹⁴ In addition, Mr. Mooney testified that his oldest son was in a car accident and suffered fractures which required surgeries, but that at the time, the Mooneys did not have adequate medical insurance and incurred hospital bills of \$80,000.00 to \$90,000.00.¹⁵

Despite the Debtors’ protestations to the contrary, it is clear that the Debtors filed this bankruptcy case because of the Gill brothers’ lawsuit against them in the Probate Court. The Debtors’ testimony to the contrary is not credible. The Debtors claimed to be solvent on the date of their bankruptcy filing. Both Debtors were employed. They were current on what they claimed at that time was their home mortgage. The other reasons proffered for their filing simply do not

¹⁴The schedules list credit card debt of \$43,060.42. Claims have been filed in the amount of \$47,696.76, of which \$12,571.31 appear to be duplicate claims, leaving non-duplicate credit card claims of \$35,125.45.

¹⁵However, the only health care providers listed on the Debtors’ schedules are listed as holding claims for approximately \$3,500.00. None of them have filed claims.

withstand scrutiny.

Despite Mrs. Mooney's testimony at the confirmation hearing that she always thought the Crowley Property was the boys' property, as noted previously, upon their bankruptcy filing, the Mooneys immediately resisted all efforts by the Gill brothers to protect their interests. The Mooneys resisted, to the point of appeal, the modification of the automatic stay which would allow the Probate Court lawsuit to proceed to a trial on the merits. They attempted to sell the Crowley Property "free and clear," despite their knowledge of the Gill brothers' claim of an interest in that property. They claimed the Crowley Property as their exempt homestead in their schedules, and have twice objected to the Gill brothers' claim.

On September 3, 2002, shortly before the confirmation hearing was scheduled to begin, the Debtors filed Amended Schedules I and J. Debtors' Ex. 3. Those amendments reflect the fact that Mrs. Mooney is not working and presently contributes no income to the household. Both Debtors testified that she suffers from depression and a lack of concentration and has been unable to hold down a job. Mrs. Mooney conceded on cross-examination, however, that she probably could obtain a job, although she also cares for their twelve year old at home. She is not presently under a doctor's care, and is not taking any medications (she claims she cannot afford them, as Mr. Mooney has no health insurance). They both testified that if Mrs. Mooney obtains employment or if Mr. Mooney's income increases, they will report it to the Chapter 13 Trustee and will contribute additional sums to their Chapter 13 plan.¹⁶ However, Mrs. Mooney testified that she has no concrete plans to obtain

¹⁶In light of what the Court learned at the confirmation hearing, the Court has little confidence that the Mooneys would, in fact, amend their schedules if either Mrs. Mooney obtains a job or Mr. Mooney receives a raise, or that they would cause a plan modification to be filed so that their creditors receive additional funds. In light of the Mooneys' conduct both pre- and post-petition, the Court does not trust them to fulfill their fiduciary duties to their creditors in their Chapter 13 case. Neither the Court nor the Standing Chapter 13 trustee should have to continue to monitor the Mooneys post-confirmation (other than to insure that their plan payments are timely made) to insure

employment during the five-year duration of the plan.

Mr. Mooney's monthly gross income is approximately \$3,200.00. His net income (net of income, medicare and social security taxes, which are not withheld from his paycheck so he pays them on his own) is \$2,560.95. Monthly expenses total \$2,455.39, resulting in excess income of \$105.56. Their phone bills are listed at \$227.00 per month, \$175.00 of which is for a cell phone which Mr. Mooney claims he needs for work. The Debtors also list a car insurance expense of \$348.67 per month - an annualized charge of \$4,184.04. They provided no explanation at trial for what appears to be an excessive insurance expense. Schedule I inaccurately lists Western General Contractors, Inc. as his present employer, but Mr. Mooney testified that he changed jobs in January 2002. His income with his present employer apparently remains the same. He is employed as a project manager in the construction industry, and has no income other than from his job. Mr. Mooney testified that the expenses now listed on Amended Schedule J were approximately the same expenses which should have been listed on Schedule J as originally filed; their expenses have not materially changed, although the Mooneys are now living together and no longer maintain separate households.

The Mooneys' plan proposes to pay \$100.00 per month for five years to their creditors, for a total of \$6,000.00. Debtors' Ex. 8. The Debtors do not propose to pay any secured creditors through their plan – their secured creditor will be paid “direct” – *i.e.*, outside the plan. *Id.* The only secured creditor identified in the plan is the Tarrant County Tax Collector. As of the confirmation hearing, the Mooneys were current on their plan payments.

The Gill brothers filed Claim No. 13 in the amount of “\$492,867.34 plus damages.” The

their compliance with the requirements of the Bankruptcy Code and/or Rules.

Debtors' plan proposes to treat this claim (if allowed, since the Mooneys are still objecting to it) as follows: they will surrender the Crowley Property, with a listed value of \$146,710.00, to the Gill brothers¹⁷ and will treat the balance of the claim, approximately \$380,356.12, as unsecured. The Gill brothers will then receive a pro rata share of the proposed distribution to all unsecured creditors. Other unsecured creditors filed claims totaling \$35,125.45 (primarily credit card debt and excluding what appear to be duplicate claims). Thus, the Gill brothers' claim is over 91% of all unsecured claims. Under the Debtors' plan, the Gill brothers would receive about \$5,000.00 over five years, or less than 1% of their unsecured claim and rightful inheritance (in present value dollars).¹⁸

The Mooneys have not made any voluntary payments to the Gill brothers during their case. The Mooneys both testified that \$100.00 per month is the best they can do; that they would pay more if they could; and that they never did anything with the intention of harming the Gill brothers.

The Gill brothers object to confirmation of the plan, claiming a lack of good faith by the Mooneys.

III. LEGAL ANALYSIS

¹⁷At some point during the bankruptcy case, the Mooneys moved out of the Crowley Property. According to the Mooneys, there was approximately \$150,000.00 in equity in the property. It was posted for foreclosure in September 2002. Notwithstanding their awareness of the Gill brothers' claims that this property was held by the Mooneys in constructive trust for them, the Mooneys did not try to stop the foreclosure or transfer title voluntarily to the Gill brothers so that they could attempt to protect themselves from the mortgage company's foreclosure. Mrs. Mooney testified that she thought the attorney ad litem would do that. Once the Gill brothers became aware that the Crowley Property was about to be foreclosed and their interest in the property cut off, the Gill brothers asked the Mooneys to transfer title to them so that they could attempt to negotiate a solution with the mortgage company. The Mooneys refused to transfer title unless the Gill brothers agreed to "credit" the "equity" in the house against their claims. Title to the Crowley Property was finally transferred to the Gill brothers on the eve of the posted foreclosure. To avoid a loss of the property, the Gill brothers borrowed \$22,000.00 to pay to the mortgage company in order to stop the foreclosure.

Mrs. Mooney's testimony that she "constantly" offered the Gill brothers the house, after she told them their money was gone and both before and after the bankruptcy filing, but that they "didn't want it," is not credible.

¹⁸ Mrs. Mooney's failure to provide an accurate accounting of all sums she received as a result of the liquidation of her sister's assets and sums expended on behalf of the Gill brothers makes precise calculation impossible.

Section 1325(a)(3) of the Bankruptcy Code provides:

(a) Except as provided in subsection (b), the court shall confirm a plan if –

* * *

(3) the plan has been proposed in good faith and not by any means forbidden by law . . .

The burden of establishing good faith is on the debtor in confirmation proceedings. *In re Daniel*, 260 B.R. 763 (Bankr. E.D. Va. 2001); *In re Dickerson*, 232 B.R. 894 (Bankr. E.D. Tx. 1999). That burden is “particularly heavy when the debtor seeks to discharge debts otherwise excepted from discharge under Chapter 7. *In re James*, 260 B.R. 498, 504 (Bankr. D. Idaho 2001) (citing *In re Padilla*, 213 B.R. 349, 352 (9th Cir. BAP 1997).

To test the debtor's good faith, the court considers the totality of the circumstances. *In re Vasquez*, 261 B.R. 654 (Bankr. N.D. Tx. 2001) (Jones, J.); *In re Kang*, 243 B.R. 666 (Bankr. N.D. Tx. 1999) (Felsenthal, C.J.) (citing *In re Chaffin*, 836 F.2d 215, 217 (5th Cir.1988)).¹⁹ The court must examine all of the facts in order to determine the debtor's good faith. *Vasquez*, at 658 (denying modification of plan as not proposed in good faith). The factors the Court should consider include:

¹⁹ The Debtors urge this Court to adopt the standard articulated in *In re Keach*, 243 B.R. 851 (1st Cir. BAP 2000). The *Keach* court criticized the broad list of factors typically used in a “totality of the circumstances” analysis, stating that a review of those circumstances must be limited to an examination of only those circumstances which are relevant, and that the “impact of the debtor’s prefiling conduct upon the dischargeability of debt had the case been filed under Chapter 7 is not a factor which is relevant to good faith.” *Id.* at 870-871. The Debtors also point to several law review articles which argue that courts have erroneously defined “good faith” in terms “saturated with morality.”

However, the Court will follow Fifth Circuit precedent on this issue. The Fifth Circuit has clearly adopted the “totality of circumstances” test. *Pub. Fin. Corp. v. Freeman*, 712 F.2d 219 (5th Cir. 1983). The Fifth Circuit has also held that “[a]lthough the debtor’s motive in invoking Chapter 13 solely to obtain discharge of a previously non-dischargeable debt, as well as the circumstances under which that debt arose, may be factors to consider as part of the totality of circumstances, they cannot, as a matter of law, suffice to show bad faith.” *In re Chaffin*, 816 F.2d 1070, 1074 (5th Cir. 1987). Although the Fifth Circuit reconsidered its decision in *Chaffin sua sponte*, see *In re Chaffin*, 836 F.2d 215 (5th Cir. 1988), and modified its prior decision in some respects, it left that portion of its opinion intact. Moreover, the lower courts in the Fifth Circuit have continued to consider whether the debts sought to be discharged would be dischargeable in Chapter 7 as one of the relevant factors in examining the totality of the circumstances. See e.g., *In re McLaughlin*, 217 B.R. 772 (Bankr.W.D.Tex.1998). While it is not the *sole* factor, and it is clear that a Chapter 13 debtor is given a broader discharge in Chapter 13 than in Chapter 7, and that a Chapter 13 debtor may permissibly obtain a discharge of debts that would not be dischargeable in Chapter 7, it remains a factor to be considered. See 11 U.S.C. § 1328(a) and cases construing same.

- the amount of proposed payments,
- the debtor's earning capacity,
- the types of debts sought to be discharged,
- the frequency with which the debtor has sought bankruptcy relief,
- the motivation and sincerity of the debtor,
- the debtor's ability to pay,
- the circumstances giving rise to the debts,
- the presence or absence of objections to the proposed plan,
- the duration of the plan,
- the accuracy of information provided by the debtor,
- whether the plan is preferential to certain creditors,
- whether the debts would be dischargeable in Chapter 7, and
- whether the debtor seeks unfairly to manipulate provisions of the Code.

In re McLaughlin, 217 B.R. 772 (Bankr.W.D.Tex.1998). The *McLaughlin* court noted that:

In examining the factors, the court must bear in mind the public policy that supports the fair and even-handed according of bankruptcy remedies to debtors whose financial distress is not attributable to misconduct on their part, and who deal fairly and openly with the court and creditors in petitioning for relief. Hence, while we must be mindful of the fresh-start purposes of the Code, and while we are not in the business of punishing debtors for bad things they did prior to filing, we must be wary of attempts by debtors to abuse the Code's remedies. Rather than have the scales tip based on a single, prominent factor, the court should look to all of the applicable factors in a case to determine whether the debtor is proceeding in good faith.

McLaughlin, at 775 (quoting *In re Sitarz*, 150 B.R. 710, 723 (Bankr. D. Minn. 1993).

Applying these factors here, and for the reasons explained more fully below, the Court concludes that the Debtors' plan is not proposed in good faith. Accordingly, confirmation must be

denied.

The amount of the proposed payments, \$100.00 per month, is minuscule given the magnitude of the debt. While it may be all that the Debtors are currently able to pay, the Court believes that the Debtors are not making full use of their earning capacity. Based on the Debtors' schedules, Mrs. Mooney was employed for the fifteen months prior to their bankruptcy filing, earning \$1,200.00 per month. While she claims to have suffered from depression ever since her sister died, that means she was suffering from depression during this fifteen month period, and yet she held a job for an extended period of time. She is no longer under a doctor's care, and is not taking any medication. She claims that the only reason she is not on medication is that she cannot afford medical care. However, there is no independent evidence, apart from her self-serving statements, that she is unable to obtain employment now or for the five-year duration of her plan. She does not appear to have made any serious efforts to find a job, and clearly has an earning capacity which would enable the Debtors to make a higher distribution to their creditors. Perhaps Mrs. Mooney would be less depressed if she made a good faith effort to make things right with her dead sister's sons.

The vast majority of the debt sought to be discharged is debt which would, without doubt, be nondischargeable in a Chapter 7 bankruptcy case. As noted previously, the Gill brothers' claim is about 91% of the total unsecured debt. The circumstances giving rise to this claim are not just unfortunate, they are appalling. Mrs. Mooney clearly breached her fiduciary duties and effectively stole a significant portion of her nephews' \$500,000.00 inheritance from them. She offered no explanation for her behavior other than her conduct was not intentional, she was not a lawyer or accountant, she was depressed and did not understand, and she did the best she could.

Once again, this testimony is not credible. You do not need to be a lawyer or an accountant

to know that taking funds which belong to someone else is wrong. Of course her conduct was intentional. She intentionally decided not to set up trusts for her nephews. She intentionally did not set up separate accounts for her nephews' money. She intentionally commingled her nephews' money with the Mooneys' money. She intentionally forged Clayton's signature on a letter regarding the liquidation of his mother's mutual funds. She told Clinton to endorse over a check so that she could deposit the proceeds into his "trust" when she knew there was no trust. She lied to her nephews on the Expense Reconstruction. And on and on and on.

It is true that this is not a "serial" filing, and that the Debtors did have significant credit card debt on the date of their bankruptcy filing. But the Court does not find that these Debtors are sincere or are motivated to make an honest effort to repay their creditors. As noted above, Mrs. Mooney has no plans to work for the foreseeable future. While protesting on the witness stand that they always felt they owed their nephews money and never intended to harm them, the Mooneys have consistently fought their nephews tooth and nail throughout this case. While objecting to the amount of the Gill brothers' claim as "grossly overstated," they opposed relief from stay so that the claim could be liquidated in the Probate Court. They claimed the Crowley Property, which was purchased with their nephews' money, as their exempt homestead, tried to sell it free and clear of any interest their nephews might have in that property, and then finally transferred the property to them on the eve of foreclosure, when their nephews stood to lose any equity that might exist in the house and only after their nephews agreed to provide them with a credit against sums they might ultimately be determined to owe to the Gill brothers.

Moreover, the Court concludes that the Debtors are attempting to unfairly manipulate the Bankruptcy Code. While they testified that their bankruptcy filing had nothing to do with the

Probate Court litigation, that testimony is not credible. The other alleged reasons for the bankruptcy filing do not withstand scrutiny. This bankruptcy case was filed to minimize the opportunity for the full extent of Mrs. Mooneys' wrongdoings to be revealed, particularly to the court which had appointed her as a fiduciary.²⁰

While one or two of the factors which this Court may consider in ruling upon the Debtors' good faith may militate in favor of a good faith finding – *i.e.*, this is their first bankruptcy case, the overwhelming majority do not. Under the totality of the circumstances, the Court concludes that the Mooneys are not proceeding here in good faith. In short, the Debtors have not met their burden under Section 1325(a)(3). Accordingly, confirmation of their plan is denied.

An Order denying confirmation will be entered separately.

SIGNED: November 26, 2002

Barbara J. Houser
United States Bankruptcy Judge

²⁰The Court would be remiss if it did not expressly find the Gill brothers' testimony credible. The Gill brothers are well educated, articulate young men. Both followed in their Mother's footsteps and are teachers, having received their college degrees from Texas Tech. Clayton is currently an athletic trainer at a high school in Fort Worth. Clinton, who graduated from Texas Tech *magna cum laude* is teaching 4th grade science in Lubbock County and is working on his Master's degree (which he is paying for himself). Notwithstanding the unfortunate circumstances surrounding their inheritance, and the burdens dealing with it has placed upon them (both financially and emotionally), after a pregnant pause, neither would testify (on cross-examination) that they thought that their aunt had done this to them with the intent to hurt them.

Notwithstanding this decision, it remains unclear the extent to which the Gill brothers will recover their financial inheritance. However, what is clear is that their aunt could not deprive them of a more important inheritance from their Mother. While the Court trusts they know this already, the Court must observe how proud their Mother would be of the grace and maturity they have displayed in dealing with this unfortunate situation.